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SHI INTERNATIONAL CORP. (erroneously sued as “SHI International, Inc.”)

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JAZMIA MOORE, individually and
on behalf of herself and all others
similarly situated ,

Plaintiff,

vs.

SHI INTERNATIONAL, INC., and
DOES 1 through 25,

Defendants.

Case No.: 2:18-cv-09865

**NOTICE OF REMOVAL OF CIVIL
ACTION UNDER 28 U.S.C. §§ 1332,
1441, AND 1446(b)(3) AND (c);
DECLARATIONS OF REGINA
MUSOLINO AND MICHAEL
HALUSKA IN SUPPORT THEREOF;
EXHIBITS**

(Los Angeles County Superior Court Case
No. 18STCV02054)

Complaint Filed: October 23, 2018
Removal Date: November 26, 2018
Trial Date: None Set

**TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HER
ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Defendant SHI International Corp. (“SHI” or
“Defendant”) (erroneously sued as “SHI International, Inc.”) hereby removes the
above-captioned action from the Superior Court of the State of California for the
County of Los Angeles to the United States District Court for the Central District of
California, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, because complete

1 diversity exists between the parties and because the amount in controversy exceeds
2 \$75,000 exclusive of interest and costs. In compliance with 28 U.S.C. § 1446(b)(3)
3 and (c), SHI asserts the following grounds for removal:

4 **PLEADINGS AND PROCEEDINGS**

5 1. On October 23, 2018, Plaintiff Jazmia Moore (“Plaintiff”) commenced an
6 action against SHI by filing a Complaint in the Superior Court of California for the
7 County of Los Angeles, Case No. 18STCV02054, asserting six causes of action for
8 (1) failure to pay overtime wages, (2) failure to provide meal and rest periods, (3)
9 failure to provide complete and accurate wage statements, (4) failure to pay all wages
10 due at termination, (5) failure to pay for all reimbursable expenses, and (6) unfair
11 business practices. (Declaration of Regina Musolino (“Musolino Decl.”), ¶ 2, Ex. A
12 (“Compl.”).) Plaintiff brought all of these claims on behalf of herself and a putative
13 class of persons who have been employed by SHI since October 23, 2014 “who were
14 paid with commissions as part of their compensation and who worked primarily from
15 one of SHI’s California offices.” (Compl., ¶ 7.) Her principal substantive allegation
16 is that she and the putative class members “were paid sales commissions on a periodic
17 basis, but not with every paycheck” such that “for the pay periods in which they did
18 not receive commission pay, such employees were incorrectly treated as exempt” for
19 the purposes of overtime and meal and rest periods. (*Id.*, ¶¶ 18-19.) She additionally
20 alleges that putative class members were not reimbursed for work-related expenses,
21 including cell phones, computers, internet access, and vehicle/travel expenses. (*Id.*,
22 ¶ 20.)

23 2. In compliance with 28 U.S.C. § 1446(a), true and correct copies of all
24 state court “process, pleadings, and orders” are attached as Exhibits A through D to
25 the Declaration of Regina Musolino.

26 3. SHI will serve written notice of the filing of this Notice of Removal on
27 Plaintiff as required by 28 U.S.C. § 1446(d) and will file this Notice of Removal with
28 the clerk of the Superior Court of the State of California in and for the County of Los

1 Angeles.

2 **TIMELINESS OF REMOVAL**

3 4. This action has not previously been removed to federal court.

4 5. A copy of the Complaint was served on SHI on October 24, 2018. This
5 Notice of Removal is timely filed within 30 days of the date of service. 28 U.S.C. §
6 1446(b).

7 6. The Complaint does not allege an amount in controversy, an estimated
8 number of putative class members, or other facts from which it can be ascertained
9 from the face of the pleadings that the case is one which is removable. (*See Compl.*)
10 However, SHI has conducted its own investigation and reviewed its employment and
11 payroll records for Plaintiff. (Declaration of Michael Haluska (“Haluska Decl.”), ¶
12 1.) Based on this review, it is clear that this action is properly removable under 28
13 U.S.C. §§ 1332, 1441, and 1446, because complete diversity exists between the
14 parties and because the amount in controversy exceeds \$75,000 exclusive of interest
15 and costs. Accordingly, this removal is appropriate and timely under 28 U.S.C. §
16 1446(b). *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1125 (9th Cir.
17 2013) (“We conclude that §§ 1441 and 1446, read together, permit a defendant to
18 remove [an action] . . . on the basis of its own information . . . A defendant should not
19 be able to ignore pleadings or other documents from which removability may be
20 ascertained . . . [b]ut neither should a plaintiff be able to prevent or delay removal by
21 failing to reveal information showing removability and then objecting to removal
22 when the defendant has discovered that information on its own.”).

23 **REMOVAL BASED ON DIVERSITY JURISDICTION**

24 **(28 U.S.C. § 1332(a)(1))**

25 7. 28 U.S.C. § 1332(a) provides in relevant part that “[t]he district court shall
26 have original jurisdiction of all civil actions where the matter in controversy exceeds
27 the sum or value of \$75,000, exclusive of interest and costs, and is between . . . (1)
28 citizens of different states[.]”

1 Cir. 2002) (“citizenship of fictitious defendants is disregarded for removal
2 purposes”); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980)
3 (same).

4 12. Because Plaintiff and SHI are citizens of different states, the diversity
5 requirement is met. 28 U.S.C. § 1332(a)(1).

6 AMOUNT IN CONTROVERSY

7 13. An action may be removed if the defendant establishes, by a
8 preponderance of the evidence, that the aggregate amount in controversy exceeds the
9 jurisdictional amount. *See Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 683
10 (9th Cir. 2006); *Bank of Cal. Nat’l Ass’n v. Twin Harbors Lumber Co.*, 465 F.2d 489,
11 491 (9th Cir. 1972). To satisfy the preponderance of the evidence test, a defendant
12 must provide evidence that “it is more likely than not” that the amount in controversy
13 is satisfied. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).
14 The removing defendant’s burden of establishing that the amount in controversy
15 exceeds \$75,000 is not daunting and thus does not require the defendant to do
16 extensive research or prove the plaintiff’s damages. *See Ray v. Wells Fargo Bank,*
17 *N.A.*, No. CV 11-01477 AHM (JCx), 2011 WL 1790123, at *5 (C. D. Cal. May 9,
18 2011) (citing *Korn v. Ralph Polo Lauren Corp.*, 536 F. Supp. 2d 1199, 1004-05 (E.
19 D. Cal. 2008)).

20 14. In determining whether the amount in controversy exceeds \$75,000, the
21 Court must presume that Plaintiff will prevail on each and every one of her claims.
22 *See Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993,
23 1001 (C. D. Cal. 2002) (citing *Burns v. Windsor Inc.*, 31 F.3d 1092, 1096 (11th Cir.
24 1994) (the amount in controversy analysis presumes that “plaintiff prevails on
25 liability”)).

26 15. The amount in controversy may include general and special
27 compensatory damages and attorneys’ fees which are recoverable by statute. *See Galt*
28 *G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998).

PLAINTIFF AND HER CLAIMS

16. Plaintiff does not allege a specific amount in controversy, but instead seeks the following relief: unpaid overtime wages pursuant to Labor Code § 510, unpaid meal and rest period premiums pursuant to Labor Code §§ 226.7 and 512(a), penalties for non-compliant wage statements pursuant to Labor Code § 226, waiting time penalties for failure to timely pay all wages due at termination pursuant to Labor Code §§ 201-03, reimbursement of business-related expenses incurred for cell phones, computers, internet access, and vehicle/travel expenses incurred by Plaintiff on behalf of SHI pursuant to Labor Code § 2802, prejudgment interest, attorneys' fees, and costs. (Compl., pp. 12-13 ("Prayer for Relief."))

17. Plaintiff was employed by SHI from approximately December 13, 2010 to September 29, 2017. (Haluska Decl., ¶ 3.) During all times relevant to the Complaint, Plaintiff held the title of Senior Account Executive and worked in California. (*Id.*, ¶ 3. *See also* Compl., ¶¶ 15, 17.) She was classified by SHI as exempt as an outside sales employee and was paid a base salary plus commissions. (Haluska Decl., ¶ 4.)

18. Plaintiff was employed for approximately 153 workweeks during the putative class period (i.e., October 23, 2014 through September 29, 2017). (Haluska Decl., ¶ 5.) She was paid bi-weekly, and thus worked 77 pay periods during the class period. (Compl., ¶ 15; Haluska Decl., ¶ 5.) She was not paid commissions during 41 of the 77 pay periods, meaning that she worked 82 weeks, or approximately 410 shifts (82 weeks x 5 days/week), during pay period in which she was not paid commissions. (Haluska Decl., ¶ 6.)

19. Her base annual salary as of 2017 was \$50,000. (Haluska Decl., ¶ 4.) Thus, with Plaintiff a full-time hourly employee working 2,080 hours per year (40 hours/week x 52 weeks/year), her regular hourly rate would have been \$24.04 (\$50,000/year ÷ 2,080 hours/year) and her overtime rate would have been \$36.06 (\$24.04/hour x 1.5).

20. In the Complaint, Plaintiff alleges that she and the putative class members were misclassified as exempt employees during the pay periods in which they did not receive commission pay, and were thus entitled to overtime pay and meal and rest period premiums during those pay periods. (*See* Compl., ¶¶ 15-16, 18-19.)

21. **Recovery of Alleged Unpaid Overtime Wages.** California Labor Code § 510 provides that work in excess of eight hours per day and/or 40 hours per week and/or for the first eight hours of the seventh day of work should be compensated at no less than one and one-half (1.5) times the regular rate of pay for the employee. The recovery of unpaid overtime wages is subject to the three-year statute of limitations for unpaid wages in California Code of Civil Procedure § 338. *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1099 (2007). However, Plaintiff seeks restitution of unpaid wages pursuant to California Business & Professions Code § 17200, *et seq.* (Compl., ¶ 21), the statute of limitations on which is four years. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178-79 (2000) (“We recognize that any business act or practice that violates the Labor Code through failure to pay wages is, by definition . . . an unfair business practice . . . Any action on any UCL cause of action is subject to the four-year period of limitations created by that section.”) (emphasis in original.)

22. Plaintiff alleges that she was “required” to work more than 8 hours in a day and more than 40 hours in a week, but that she was not paid overtime in violation of Labor Code § 510. (Compl., ¶ 24.) Plaintiff alleges that she was often required to work more than 10 hours in a day, meaning that she worked in excess of 2 hours of overtime during many shifts. (Comp., ¶ 31). However, to provide a more conservative estimate, SHI assumes for the purposes of this removal that Plaintiff was required to work an average of only one hour of overtime during the 410 shifts she worked during pay periods in which she did not receive commissions. Accordingly, the total amount in controversy for Plaintiff’s overtime claim is **\$14,784.60** (\$36.06/hour overtime rate x 1 hour of overtime/shift x 410 shifts).

23. **Recovery of Meal and Rest Period Premiums.** Pursuant to Labor Code § 512, an employee is entitled to a meal period of not less than 30 minutes for a work period of more than five hours per day. Pursuant to the IWC Wage Orders, employees are additionally entitled to a paid 10-minute rest period for every 4 hours worked or major fraction thereof. *See, e.g.,* Wage Order 7-2001, § 12(A). The remedy for failure to give an employee a meal or rest period is one hour of pay at the employee's regular rate, and this remedy is subject to the three-year statute of limitations in Code of Civil Procedure § 338(a). *Murphy*, 40 Cal. 4th at 1102-14. However, because Plaintiff seeks wages for meal and rest period violations pursuant to California Business & Professions Code § 17200, *et seq.* (Compl., ¶ 21), the statute of limitations is four years. *Cortez*, 23 Cal. 4th at 178-79.

24. Plaintiff alleges that SHI failed to provide her with meal or rest periods because she was not permitted to leave her place of work or relieved of all duty. (Compl., ¶ 31.) For the purposes of this removal, SHI assumes Plaintiff was not provided with one meal period and one rest period in each of the 410 shifts she worked during pay periods in which she did not receive commissions, meaning that she would be owed 820 meal and rest period premiums (410 meal period premiums and 410 rest period premiums). Thus, the amount in controversy as to this claim is **\$19,712.80** (\$24.04/hour x 820).

25. Further, because Plaintiff alleges that she was not provided with meal periods and/or required to remain on-duty during her meal periods, she would additionally be owed compensation for the time spent working otherwise on-duty during the 30-minute meal periods. And because she was a full-time employee, time worked during meal periods would necessarily be overtime to be compensated at her overtime rate. Accordingly, the additional amount in controversy as to Plaintiff's claim for on-duty meal periods is **\$7,392.30** (\$36.06/hour x 410 shifts x 0.5 hours).

26. **Recovery of Wage Statement Penalties.** Plaintiff next seeks statutory penalties for SHI's alleged failure to provide accurate wage statements in violation of

1 California Labor Code § 226. (Compl., ¶¶ 34-38.) Under Section 226(e), an injured
 2 employee can recover actual damages or penalties of \$50 for the initial pay period in
 3 which a violation occurs and \$100 for each violation in a subsequent period (up to an
 4 aggregate penalty of \$4,000) for a knowing and intentional violation. Cal. Labor
 5 Code § 226(e). The statute of limitations for failure to provide accurate wage
 6 statements is one year. Cal. Code Civ. Proc. § 340(a).

7 27. The Complaint contains no specific allegations as to how the wage
 8 statements provided by SHI failed to comply with Labor Code § 226, instead simply
 9 quoting the statute at length (Compl. ¶¶ 34-38), but SHI presumes that this claim is
 10 derivative of Plaintiff's substantive claims for unpaid overtime and meal and rest
 11 period premiums, meaning that the wage statements would only be inaccurate in pay
 12 periods during which Plaintiff did not receive commissions, and was thus allegedly
 13 entitled to overtime pay and meal and rest period premiums. Plaintiff's employment
 14 with SHI ended on September 29, 2017—i.e., more than one year before the filing of
 15 the Complaint. Therefore, the estimated value of this claim is \$0.

16 28. **Waiting Time Penalties.** Plaintiff also seeks statutory waiting time
 17 penalties pursuant to California Labor Code §§ 201-203 because SHI allegedly failed
 18 to pay all wages owed at the time of termination of her employment. (Compl., ¶¶ 39-
 19 44.) Under Section 203, terminated employees who are not paid all wages owed at
 20 the time of separation from employment may recover a penalty that is equal to their
 21 daily wage up to a maximum of 30 days. Cal. Labor Code § 203(a). The statute of
 22 limitations for a claim for waiting time penalties is three years. Cal. Labor Code §
 23 203(b); *Pineda v. Bank of Am., N.A.*, 50 Cal. 4th 1389, 1395-98 (2010).

24 29. As set forth above, Plaintiff's regular rate was \$24.04. Thus, assuming
 25 that her "daily wage" is equal to 8 hours at her regular rate, her "daily wage" would
 26 be \$192.32, and the value of this claim would be **\$5,769.60** (\$192.32/day x 30 days).

27 30. **Unreimbursed Business Expenses.** Plaintiff next seeks reimbursement
 28 of "expenses incurred in the course of performing [her] job[]," for which she was

1 allegedly not reimbursed in violation of Labor Code § 2802. (Compl., ¶¶ 45-47.)
2 Plaintiff alleges that she and “other members of the Class were required to use their
3 own cell phones, computers and internet access” as well as “their own vehicles” in
4 order to perform their jobs. (Compl., ¶ 20.) The statute of limitations on a claim
5 based on unreimbursed business expenses is three years. Cal. Civ. Proc. Code § 338.

6 31. Plaintiff worked 23 full months during the three years prior to the filing
7 of the complaint (November 2015 through September 2017). SHI assumes that
8 Plaintiff was not reimbursed \$30/month for cell phone expenses, \$10/month for
9 internet expenses, and \$50/month for vehicle/travel expenses, for a total of \$90/month
10 in unreimbursed expenses. SHI additionally assumes that the value of Plaintiff’s
11 unreimbursed computer is \$600, placing the value of this claim at **\$2,670** (\$90/month
12 x 23 months + \$600).

13 32. **Amount in Controversy as to Plaintiff’s Substantive Claims.** In total,
14 the value of Plaintiff’s claims for unpaid overtime (\$14,754.60), meal and rest period
15 premiums (\$19,712.80), unpaid wages for on-duty meal periods (\$7,392.30), wage
16 statement penalties (\$0), waiting time penalties (\$5,769.60), and unreimbursed
17 business expenses (\$2,670) total **\$50,299.30**.

18 33. **Attorneys’ Fees.** Finally, Plaintiff seeks attorneys’ fees to the extent
19 recoverable by statute, including Labor Code § 218.5 and Code of Civ. Proc. § 1021.5.
20 (Compl., ¶¶ 25, 38, 44, 47, “Prayer for Relief.”) “Where an underlying statute
21 authorizes an award of attorneys’ fees, either with mandatory or discretionary
22 language, such fees may be included in the amount in controversy.” *Galt G/S v. JSS*
23 *Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). “When assessing the amount in
24 controversy, the court considers the amount of attorneys’ fees to be accrued
25 throughout the entirety of the litigation.” *Cain v. Hartford Life & Acc. Ins. Co.*, 890
26 F. Supp. 2d 1246, 1250 (C. D. Cal. 2012) (citing *Simmons v. PCR Tech.*, 209 F. Supp.
27 2d 1029, 1034 (N. D. Cal. 2002)). *See also Sasso v. Noble Utah Long Beach, LLC*,
28 No. CV 14-09154-AB (AJWx), 2015 WL 898468, at *5-6 (C. D. Cal. Mar. 3, 2015);

1 *Garcia v. ACE Cash Express, Inc.*, No. SACV 14-0285-DOC (RNBx), 2014 WL
2 2468344, at *5 (C. D. Cal. May 30, 2014). “The Court can use its discretion to
3 determine, within its own experience, that an award of attorneys’ fees alone will
4 satisfy the amount in controversy requirement. ‘Even a minimal award of attorney’s
5 fees would cause the amount in controversy to exceed the jurisdictional minimum.’”
6 *Cain*, 890 F. Supp. 2d at 1250 (quoting *Haase v. Aerodynamics Inc.*, No. 2:09-cv-
7 01751-MCE-GGH, 2009 WL 3368519, at *5 (E. D. Cal. Oct. 19, 2009)).

8 34. Attorneys’ fees awards from similar cases, as well as the Court’s own
9 knowledge and experience in ruling on prevailing plaintiffs’ motions for attorneys’
10 fees in actions asserting employment-related claims based on alleged violation of the
11 California Labor Code, make it readily apparent that it is “more likely than not” that
12 Plaintiff will seek attorneys’ fees in excess of **\$80,000** if this case is litigated through
13 trial to a judgment. SHI reasonably estimates at this juncture that its own attorneys’
14 fees to defend this action through a trial and post-trial motions will be over \$150,000
15 based on its own past litigation experience. Plaintiff cannot reasonably dispute that
16 she will seek an award of attorneys’ fees of at least \$80,000, should her counsel
17 litigate this matter through trial. Indeed, lead counsel in this matter, Aaron Gundzik
18 of Gartenberg Gelfand Hayton LLP, in 2015 sought \$80,000 in attorneys’ fees in a
19 wage and hour action with a putative class consisting of only 33 individuals and which
20 *settled* during discovery—prior to class certification motion practice or trial. *Salgado*
21 *v. Land O’lakes, Inc.*, No. 1:13-CV-789-LJO-SMS, 2015 WL 7352451, at *2 (E. D.
22 Cal. Nov. 19, 2015).

23 35. California state and federal courts have recognized the reality of
24 significant attorneys’ fee awards, including six-figure awards, in both single plaintiff
25 and class wage and hour actions. *See Martin v. The Old Turner Inn*, 42 Trial Digest
26 6th 3, 2003 WL 22416020 (Cal. Super. Ct. Feb. 27, 2003) (awarding \$147,610 in
27 attorneys’ fees and costs in a single-plaintiff wage and hour case in which the plaintiff
28 recovered \$49,508 in compensatory and punitive damages); *Bandoy v. Huh*, 24 Trials

1 Digest 2d 51, 1996 WL 675978 (Cal. Super. Ct. Sept. 26, 1996) (awarding \$73,680
2 in attorneys' fees in a wage-and-hour misclassification case in which the plaintiff
3 recovered in excess of \$200,000 in unpaid wages); *Lippold v. Godiva Chocolatier,*
4 *Inc.*, No. C 10-00421 SI, 2010 WL 1526441 at *4 (N.D. Cal. Apr. 15, 2010) (citing
5 *Martin and Bandoy* and denying plaintiff's motion to remand a similar wage and hour
6 dispute, and noting that "a reasonable estimate of attorneys' fees likely to be
7 expended" should be included in calculating the amount in controversy, and crediting
8 defendant's assertion that it is reasonable to expect plaintiff's attorneys' fees in a
9 single plaintiff wage and hour matter to "typically spend far more than 100 hours on
10 a case" at a rate of \$400 per hour) (citations omitted).

11 36. Accordingly, assuming that Plaintiff seeks *only* **\$80,000** in attorneys' fees
12 in connection with the matter, the amount in controversy is **\$130,299.30**, well in
13 excess this court's jurisdictional minimum.

14 VENUE

15 37. Venue lies in this Court pursuant to 28 U.S.C. §§ 1441, 1446(a), and
16 84(c). This action was originally brought in the Superior Court of the State of
17 California, County of Los Angeles, which is located within the Central District of
18 California. (*See* Musolino Decl., ¶ 2, Ex. A.) Therefore, the action is properly
19 removed to this Court because it is the "district and division embracing the place
20 where such action is pending." 28 U.S.C. § 1441(a).

21
22 Dated: November 26, 2018

CONSTANGY, BROOKS, SMITH &
PROPHETE, LLP

23
24 By: /s/ Kenneth D. Sulzer
25 Kenneth D. Sulzer
26 Attorneys for Defendant
SHI INTERNATIONAL CORP.